

08 CV 0226 W (AJB)
Declaration of Ellen Dowd, Esq.
In Support of Ex Parte Application
For Leave To File Sur-Reply

1 3. I have personal knowledge of the facts stated herein, and, if called as a
2 witness, I could and would testify competently thereto. I make this declaration in
3 support of Plaintiff's Ex Parte Application For Leave To File Sur-Reply in Support
4 of Plaintiff's Opposition to OAH's Motion For Intervention.

5 4. On March 18, 2008 I e-mailed Gabriel Vivas, Esq. attorney
6 representing Defendant, CDE inquiring about CDE's overdue Answer.

7 5. While, over the course of several e-mails, it appeared that CDE was
8 going to file a motion to dismiss, or, alternatively move for an extension of time to
9 Answer the Complaint (Exhibits A and B to Plaintiff's Opposition to Motion For
10 Intervention), on March 25, 2008, CDE filed and served its Answer to Complaint.

11 6. On March 24, 2008, pursuant to an Order of the Court, Plaintiff filed
12 its Opposition to OAH's Motion For Intervention. However, without having the
13 benefit of CDE's Answer prior to filing its Opposition, Plaintiff's was without up-
14 to-date information about CDE's ability to adequately represent OAH's interests in
15 this case.

16 7. On March 28, 2008, OAH filed an served its Reply to Plaintiff's
17 Opposition to Motion For Intervention. In its Reply, OAH incorrectly states that
18 "CDE's response to the complaint has no bearing on OAH's intervention." (Reply
19 p. 3 lines 22-23 and footnote 2). OAH also incorrectly states that "CDE and OAH
20 have different interests..." (Reply page 4 line 2).

21 8. Clearly, OAH did not read and consider CDE's allegations in its
22 Answer before filing its Reply.

23 9. In paragraph 3 of its Answer, CDE denies that OAH has violated
24 IDEA. This defends OAH.

25 10. In paragraph 15 of its Answer, CDE denies that the 45-day timeline
26 imposed by 20 U.S.C. § 1315(g)(2) was enacted to protect the rights of disabled
27 students.
28

1 11. Similarly, in paragraph 59 of its Answer, CDE denies that the 45-day
2 rule was enacted to promote speedy exhaustion of remedies.

3 12. Among the many responses by CDE to the allegations in the
4 Complaint that “the contents of the quarterly reports [published on CDE’s website]
5 speak for themselves,” in paragraph 58 of its Answer, CDE denies the
6 characterization of the quarterly reports as not accurately reflecting the correct
7 number of Decision rendered within the statutory 45-day timeline, as alleged in
8 Complaint, paragraph 58. This defends OAH.

9 13. In paragraph 26 of its Answer, CDE admits that CDE receives federal
10 funds, but denies that these funds are specified to provide Mediation and Due
11 Process Hearings for special education students by qualified Hearing Officers.

12 14. Many of CDE’s responses to the Complaint cite “CDE and OAH
13 websites speak for themselves...”, when the websites are actually linked, as are
14 CDE and OAH’s interests in this litigation. CDE and OAH jointly publish the data
15 in the quarterly reports. CDE’s alignment of interest with OAH is explicit in its
16 Answer.

17 15. Whether the responses in CDE’s Answer, and denials appurtenant
18 thereto are made in good faith is not a question for this Ex Parte Application. The
19 question is whether, based upon all relevant pleadings and information, CDE can
20 adequately represent OAH’s interests at this time.

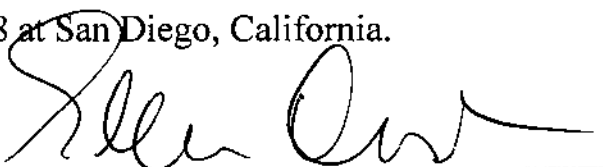
21 16. From the four corners of its Answer, CDE is defending both itself and
22 OAH. Without additional proof that OAH’s interests are not adequately
23 represented by Defendant, CDE, intervention by OAH should not be permitted.

24 17. Plaintiff respectfully requests that before any intervention by OAH is
25 permitted, Plaintiff be allowed leave to file a Sur-Reply.

26 I declare under penalty of perjury under the laws of the United States of
27 America and the State of California that the foregoing is true and correct.

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1 Executed this 1st day of April, 2008 at San Diego, California.

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4 Ellen Dowd